Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

VICTORIA DOYLE and DUFFEY DOYLE,

Petitioners,

vs.

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGENWERK AKTIENGESELLSCHAFT,

Respondents.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the Volkswagen passive seat belt system which does not have a lap belt violate the requirements of 15 U.S.C. 1410b(f)(2), which requires an integrated lap and shoulder belt?

2. Does the Volkswagen passive seat belt system which does not have a lap belt violate the Federal Motor Vehicle Safety Standard 209 S4.1(b), which requires all seat belt systems to have a lap belt?

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Honorable Julie Carnes, United States District Judge

Cathey & Strain, Amicus Curiae

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Volkswagen of America, Inc., Appellee

Volkswagenwerk Aktiengesellschaft, Appellee

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CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the United States Court of Appeals for the Eleventh Circuit is found at *Doyle v. Volkswagenwerk,* 114 F.3d 1134 (11th Cir. 1997). A previous opinion of the Eleventh Circuit is found at *Doyle v. Volkswagenwerk,* 81 F.3d 139 (11th Cir. 1996). The opinion of the United States District Court for the Northern District of Georgia is unpublished.

BASIS FOR JURISDICTION

Judgment was entered by the United States Court of Appeals for the Eleventh Circuit on June 12, 1997. Rehearing was denied on September 16, 1997.

Plaintiff believes that jurisdiction is conferred upon the United States Supreme Court to review this matter pursuant to 28 U.S.C. §1254(1) and Rule 10(c), Supreme Court Rules.

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The disposition of this case involves construction of the following statutes and regulations:

15 U.S.C. §1410b(f)(2) – The term "belt system" means an occupant restraint system consisting of integrated lap and shoulder belts for front outboard occupants.

49 C.F.R. §571.208 S4.5.3 which is set out in the appendix.

49 C.F.R. §571.209 S3 which is set out in the appendix.

49 C.F.R. §571.209 S4.1(b) – Pelvic restraint. A seat belt assembly shall provide pelvic restraint whether or not upper torso restraint is provided, and the pelvic restraint shall be designed to remain on the pelvis under all conditions, including collision or rollover of the motor vehicle.

STATEMENT OF THE CASE

This case was brought by Victoria Doyle alleging that her 1989 Volkswagen Jetta was defective for failing to contain a lap belt. On August 18, 1989, Mrs. Doyle was involved in an automobile collision, after which she immediately complained of intense pain in her right chest. For health reasons, Plaintiff had previously undergone a double subcutaneous mastectomy with insertion of breast implants. Several days after the wreck, her doctor diagnosed a herniation of her pectoral muscle around her right implant. Complications and infection from the surgery resulted in seven additional surgeries and eventual removal of the right nipple.

The 1989 Volkswagen Jetta being driven by Mrs. Doyle incorporated a passive seat belt system consisting of an automatic or passive shoulder belt and knee bolsters. A knee bolster is a padded area under the instrument panel that is designed to impact with the knee and thereby stop the forward or submarining movement of the pelvis. The Volkswagen Jetta did not contain a lap belt.

Plaintiffs contend that the absence of the lap belt was the proximate cause of those injuries. Billy Peterson, a

safety engineer and former engineer for the National Highway Traffic Safety Administration (NHTSA), testified that Mrs. Doyle's injury was caused by the failure of the manufacturer to install a lap belt. Without a lap belt to help distribute the force of the impact, the majority of the force from the wreck was focused on the right breast of Mrs. Doyle. Dr. Joseph Burton, a forensic pathologist and biomechanic, agreed that had a lap belt been present the forces of this wreck should not have caused the herniation around the implant.

Following completion of discovery, the Plaintiff moved for partial summary judgment seeking to have the Volkswagen seatbelt system declared in violation of the Federal Motor Vehicle Safety Standards (FMVSS). The Defendant filed a Cross-Motion for Summary Judgment seeking to have the Plaintiff's complaint dismissed on state law grounds as well as seeking to bar the Plaintiff's claim as pre-empted by the Federal Motor Vehicle Safety Standards (FMVSS).

The District Court ruled that the Volkswagen system complied with the safety standards and that Plaintiffs' cause of action was not barred by Federal pre-emption. However, the District Court dismissed the Plaintiffs' complaint finding that because the system complied with FMVSS the cause of action failed to state a claim under Georgia law. The District Court relied on the Georgia Court of Appeals ruling in *Honda Motor Co. v. Kimbrel*, 189 Ga. App. 414, 376 S.E.2d 379 (1988). The Eleventh Circuit agreed with the District Court that the seat belt system complied with FMVSS and that the cause of action was not pre-empted under Federal law, and certified the remaining issue, as to whether the case was viable under

Georgia state law, to the Georgia Supreme Court. *Doyle v. Volkswagenwerk*, 81 F.3d 139 (11th Cir. 1996). After the certified question was answered by the Georgia Supreme Court that the case did survive under Georgia law, the Eleventh Circuit reversed and remanded to the District Court for trial.

The plaintiff seeks review of that portion of the decision of the Eleventh Circuit that held that the seat belt system complied with the Traffic and Motor Vehicle Safety Act and the Federal Motor Vehicle Safety Standards.

The basis for jurisdiction for the United States District Court was diversity jurisdiction and amount in controversy pursuant to 28 U.S.C. §1332.

REASONS FOR GRANTING THE WRIT

Plaintiffs believe that this case presents compelling reasons for granting the Writ of Certiorari in accordance with Rule 10(c), Supreme Court Rules. The ruling of the District Court and the Eleventh Circuit are in direct conflict with the plain language of the Traffic and Motor Vehicle Safety Act as well as the Federal Motor Vehicle Safety Standards on an important safety issue. Scientists have known since the early 1960s that a shoulder belt only system without a lap belt posed a serious health risk. It was for these same safety reasons that the requirement of a lap belt was put into the regulations. This requirement has remained unchanged since the very first adoption of the regulations.

A. The Important Safety Issue Involved In This Case

The early research into the effectiveness of seat belts started in the 1950s.[1] By the 1960s, much research was being done on both the effectiveness and the design of seat belts. One of the systems studied was a belt found in Europe known by various names, such as the "bandolier" type belt, the "diagonal" belt, the shoulder harness, or the "two point" belt. In a 1962 article presented at the Sixth Stapp Car Crash Conference,[2] researchers reported, "Two tests of a diagonal chest strap indicated that this type of seat belt, with no lap strap adjunct, can be inadequate and can produce severe side effects." *Dynamic Tests of Restraining Devices for Automobile Passengers*, Michelson, I., Aldman, B., Tourin, B., and Mitchell, J., Public Health Reports, Vol. 79, No. 2, Feb. 1964, p. 125 at 134. Another important development in this research was an article written by Richard G. Snyder and others entitled, *Seat Belt Injuries in Impact*, Snyder, Richard G., Crosby, W.M., Young, J.W., Snow, C.C., and Hanson, P., University of Michigan, Ann Arbor; Highway Safety Research Institute, 1967. Dr. Snyder, an engineer with Ford Motor Company, conducted sled tests using baboons to evaluate the effectiveness of several types of seat belt systems. In studying

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[1] *Federal Seat-Belt Regulation – A Progress Report*, Neff, R. Proceedings of the 8th Stapp Car Crash and Field Demonstration Conference, October 21-23, 1964, Wayne State University Press, Detroit, 1966, p. 76.

[2] The Stapp Car Crash Conference is the premier engineering conference on automotive crashworthiness named after Colonel John Stapp, an early researcher in the area of seat belts.

the diagonal belt system, Dr. Snyder reported a history of chest injuries from this type of belt. In discussing the injuries attributed to the diagonal belts, Dr. Snyder stated, "Injuries were similar in each case, with a high proportion of rib fractures and thoracic injury caused by impingement upon the diagonal belt." *Seat Belt Injuries in Impact*, Snyder, Richard G., et al. *supra* at page 197. " . . . [W]e must caution those advocating the use of the single diagonal belt only (with no lap belt) as an adequate seat belt system. . . . [T]he results to date do indicate strongly that this can be a highly dangerous device." *Seat Belt Injuries in Impact*, Snyder, Richard G., et al. *supra* at page 201. In a later study, Dr. Snyder noted,

> There have been several studies of injuries attributed to this type of belt – including data on chest injuries, as well as ruptured spleen, and sternal fracture . . . In each case, massive destruction of the thoracic cage occurred, with extensive avulsion and rupture of the pectoral muscles, numerous rib fractures. . . .

Pathology of Trauma Attributed to Restraint Systems in Crash Impacts, Snyder, Richard G., Snow, Clyde C., Young, Joseph W., Crosby, Warren W., Price, G. Townley, Federal Aviation Administration Office of Aviation Medicine, February 1969, p. 11. In fact, the diagonal belt proved so dangerous that Dr. Snyder's baboon tests using the diagonal belt were stopped after the first three baboons were killed instantaneously by the belt.

Recognizing the safety problem of the two point belt, Russell J. Neff, the Chairman of the Society of Automotive Engineers ("SAE") Motor Vehicle Seat Belt Committee, submitted a report which supported the enactment of

legislation requiring the use of safety belts to the 8th Stapp Car Conference in October, 1964. Neff noted that an almost identical version of SAE standard J4b had been published by the Commerce Department in the Federal Register as a proposed safety standard. Section three of SAE J4b, the Society of Automotive Engineers, provided as follows:

> 3.2 Pelvic Restraint – A seat belt assembly shall provide pelvic restraint whether or not upper torso restraint is provided, and the pelvic restraint shall be designed to remain on the pelvis under all conditions, including collision or rollover of the motor vehicle.

Neff pointed out that the SAE Committee was in concurrence with SAE J4b that "an upper torso device should never be used without the lap belt, recognizing that there is considerable evidence to indicate that an adverse occupant load situation known as submarining can occur when upper torso restraint is used alone." *Federal Seat-Belt Regulation – A Progress Report*, Neff, R. Proceedings of the 8th Stapp Car Crash and Field Demonstration Conference, October 21-23, 1964, Wayne State University Press, Detroit, 1966, p. 76. In 1966 the FMVSS 209 S4.1(b) language was adopted. 31 FR 11528 (August 31, 1966); 32 FR 2408, 2415 (February 3, 1967). Despite the numerous revisions that FMVSS 208 and 209 have undergone, Federal Motor Vehicle Safety Standard 209, S3 and S4.1 have remained the same.

More recently, the National Transportation Safety Board (NTSB) reviewed the inadequacies of this type of restraint. In a draft report dated May 23, 1993, the NTSB concluded:

> The potential dangers of dependence on only an upper torso restraint have been known to the medical profession for three decades. In the 1960s the "diagonal" or shoulder belt was installed in several European automobiles. A Swedish doctor documented three cases of fatal neck injury (two decapitations) of occupants wearing the diagonal safety belt. . . . Cases 34, 48 and 52 demonstrate the inadequate occupant protection in vehicles equipped with a shoulder belt without a lap belt. Occupants can submarine through the shoulder belt and suffer fatal injuries or can eject through the belt and suffer fatal neck injuries or can eject when the door opens and suffer fatal injuries.

NTSB Study on Special Investigations on Automatic Restraints On Passenger Vehicles, Draft May 23, 1993, pp. 4-2 and 4-3.

The seat belt system contained in the Volkswagen, as well as a similar seat belt system first introduced by Toyota, which incorporates a passive shoulder belt and a manual lap belt are found in literally millions of motor vehicles. The safety problem is widespread and potentially affects millions of drivers each day. Because of these compelling safety concerns and the incorrect interpretation of the statute and regulations given by the Eleventh Circuit, Petitioner believes that this case merits the granting of the Writ of Certiorari.

B. Analysis of The Statute And Regulations Involved.

DOES THE VOLKSWAGEN PASSIVE SEAT BELT SYSTEM WHICH DOES NOT HAVE A LAP BELT VIOLATE

THE REQUIREMENTS OF 15 U.S.C. §1410b(f)(2), WHICH REQUIRES AN INTEGRATED LAP AND SHOULDER BELT?

Plaintiffs contend that the Volkswagen shoulder strap, without a lap belt, violates the Traffic and Motor Vehicle Safety Act, 15 U.S.C. §1381, et seq. and in particular 15 U.S.C. §1410b(f)(2). More specifically, the 1974 Amendment to the Safety Act requires the use of an integrated lap and shoulder belt unless otherwise approved by Congress. 15 U.S.C. §1410b.

Congress enacted the National Traffic and Motor Vehicle SafetyAct of 1966 in response to the alarming number of deaths and personal injuries on the nation's highways. 15 U.S.C. §1381 et seq.; *State Farm Mut. Automobile Ins. Co. v. Department of Transportation,* 680 F.2d 206, 209 (D.C. Cir. 1982), *vacated and remanded, Motor Vehicle Manufacturers Assoc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Due to the growing air bag controversy, the "Safety Act" was amended in 1974 to add the following provision:

> "Except as otherwise provided in paragraph (3), no Federal motor vehicle safety standard respecting occupant restraint systems may – (A) have the effect of requiring, or (B) provide that a manufacturer is permitted to comply with such standard by means of, an occupant restraint system *other than a belt system.*" [Emphasis supplied]

15 U.S.C. §1410(b)(2). The Motor Vehicle and Schoolbus Safety Amendments of 1974 "sharply reduced DOT's discretion to modify Standard 208 [or 209] in the future. If a modified standard could be satisfied by any system other

than seatbelts only, the amended safety standard would have to be submitted to Congress where it might be vetoed by concurrent resolution of both houses." *State Farm Mut. Automobile Ins. Co. v. Department of Transportation*, 680 F.2d 206, 211 (D.C. Cir. 1982), *vacated and remanded, Motor Vehicle Manufacturers Assoc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); 15 U.S.C. §1410b.

"Belt System" was defined by the 1974 Amendments to the Safety Act as follows:

> The term "belt system" means an occupant restraint system consisting of integrated lap and shoulder belts for front outboard occupants and lap belts for other occupants. [Emphasis supplied]

15 U.S.C. §1410b(f)(2).

By the time of the 1974 amendment, there were several alternative proposals being suggested including airbags, automatic belts, and buzzer/interlock systems. Congress wanted to insure that any safety standard that allowed something other than a traditional "integrated lap and shoulder belt" design would first be submitted to it for approval. Existing standards not in compliance with this mandate would have to be modified to comply. The definition of "belt system" by its own terms, precludes the use of a shoulder belt without a lap belt. 15 U.S.C. §1410b(f)(2). Had Congress wanted the Volkswagen system to be an option, it would not have used the very specific language requiring an "integrated lap and shoulder belt".

Plaintiffs cannot imagine a clearer expression of Congressional intent. Thus, the Volkswagen system is in plain violation of 15 U.S.C. §1410b(f)(2) by failing to provide an *integrated lap* and *shoulder* belt.

DOES THE VOLKSWAGEN PASSIVE SEAT BELT SYSTEM WHICH DOES NOT HAVE A LAP BELT VIOLATE THE FEDERAL MOTOR VEHICLE SAFETY STANDARD 49 C.F.R. §571.209 S4.1(b), WHICH REQUIRES ALL SEAT BELT SYSTEMS TO HAVE A LAP BELT?

Even prior to the adoption of the 1974 amendments to the National Traffic and Motor Vehicle Safety Act, the Federal Motor Vehicle Safety Standards were quite clear that the Volkswagen system was not permissible. The Federal Motor Vehicle Safety Standards ("FMVSS") that apply in this case are found at 49 C.F.R. §571.208 and §571.209 respectively. They will be referred to as Standard 208 and Standard 209 for brevity. A common sense reading of the regulations shows that the Volkswagen system is in violation of these two standards. Standard 209 is very clear and specific about the requirement of a lap belt as a part of every seat belt assembly. Standard 209 (49 C.F.R. §571.209) states:

> S4.1(b) *Pelvic restraint.* A seat belt assembly *shall* provide *pelvic restraint* whether or not upper torso restraint is provided, and the pelvic restraint shall be designed to remain on the pelvis under all conditions, including collision or roll-over of the motor vehicle. [Emphasis supplied]

In addition, Standard 209 S3 provides the definitions needed to understand both standards 208 and 209. The pertinent definitions are as follows:

> *Pelvic restraint* means a seat belt assembly or portion thereof intended to restrain movement of the pelvis.
>
> *Seat belt assembly* means any strap, webbing, or similar device designed to secure a person in a motor vehicle in order to mitigate the results of any accident, including all necessary buckles and other fasteners, and all hardware designed for installing such seat belt assembly in a motor vehicle.
>
> *Strap* means a narrow nonwoven material used in a seat belt assembly in place of webbing.
>
> *Type 1 seat belt assembly* is a lap belt for pelvic restraint.
>
> *Type 2 seat belt assembly* is a combination of pelvic and upper torso restraints.
>
> *Type 2a shoulder belt* is an upper torso restraint for use *only* in *conjunction with* a *lap belt* as a Type 2 seat belt assembly.
>
> *Upper torso restraint* means a *portion* of a seat belt assembly intended to restrain movement of the chest and shoulder regions.
>
> *Webbing* means a narrow fabric woven with continuous filling yarns and finished selvages.

49 C.F.R. §571.209 S3. [Emphasis supplied] Thus, every seat belt assembly must contain a pelvic restraint consisting of a strap or webbing. The Volkswagen does not contain the lap belt portion of the system, and thus cannot be a complete system.

Volkswagen argues that the knee bar or bolster serves the same function as the pelvic restraint and thus complies with the standard. A knee bar or knee bolster cannot be a pelvic restraint for at least three reasons. First, Standard 209 S4.1(b) provides that the pelvic restraint must "be designed to remain on the pelvis under all conditions, including collision or roll-over of the motor vehicle." The knee bar never goes on the pelvis and thus it cannot "remain on the pelvis" as required by 209 S4.1(b).

Second, a knee bolster cannot be a pelvic restraint, because it is not a strap or webbing. Standard 209 S3 defines pelvic restraint as a "seat belt assembly . . . intended to restrain movement of the pelvis. A seat belt assembly is defined as a "strap, webbing or similar device. . . . " Strap and webbing have very specific definitions under the Standard. Clearly, a knee bar is not similar to a strap or webbing.

Finally, the pelvic restraint must be designed to "restrain the movement of the pelvis" The knee strap is designed to stop the movement of the knees in a forward direction. It does nothing to prevent the pelvis from going up and over the knees or to restrain the pelvis in any meaningful way.

Volkswagen argues that 49 C.F.R. §571.208 S4.5.3 creates a new belt called an "automatic belt" that does not have to comply with the other regulations as to safety belts. One needs to look no further than the standard itself to disprove Volkswagen's assertion that an automatic belt need not meet any Standard 209 requirements. The automatic belt section states as follows:

> S4.5.3 *Automatic Belts.* Except as provided in S4.5.3.1, a *seat belt assembly* that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4, and in place of any seat belt assembly otherwise required by that option. [Emphasis supplied]

48 C.F.R. §571.208 S4.5.3. The term "seat belt assembly," is defined in only one place, i.e. Standard 209 S3. Clearly Volkswagen does not have a "seat belt assembly," but rather an "upper torso restraint." It is noteworthy that "upper torso restraint by definition is only a "portion of a seat belt assembly." See, Standard 209, S3. Thus, the shoulder belt is only a portion of a seat belt assembly. The Volkswagen belt best fits the definition of a Type 2a assembly, which must be used "only in conjunction with a lap belt." 49 C.F.R. 571.209 S3. Thus, the Volkswagen system is precluded by the plain language of the Standard.

Next, Volkswagen argues and the District Court found that Standard 208 S4.5.3 "automatic belts" are exempted from all Standard 209 requirements by 208 S4.5.3.4. See, District Court Order, p. 10. Contrary to the assertions by Volkswagen, an automatic belt is not exempted from meeting all Standard 209 requirements. Rather, Standard 208 S4.5.3.4 states, "An automatic belt furnished pursuant to S4.5.3 that is not required to meet the perpendicular frontal crash protection requirements of S5.1 shall conform to the webbing, attachment hardware, and assembly performance requirements of Standard No. 209." This section refers to three specific portions of Standard 209: *"webbing, attachment hardware,*

and *assembly performance* requirements." Specifically, automatic belts are exempted from Standard 209 S4.2 entitled "Requirements for Webbing", Standard 209 S4.3, entitled "Attachment Hardware", and Standard 209 S4.4 entitled "Requirements for Assembly Performance." The section relied upon by Volkswagen merely says that "automatic belts" need not meet those very specific hardware performance requirements. It does not exempt "automatic belts" from all 209 requirements.

Several factors belie the strained reading given to Standard 208 S4.5.3.4 by Volkswagen. First, Standard 209 states in section S1 and S2 that it is the governing standard for all seat belt assembly requirements. Seat belt assemblies are neither defined nor described elsewhere in the standards. Second, to interpret the amendments as the Defendants have done would make the passive belt section run afoul of 15 U.S.C. §1410b requirement of an integrated lap and shoulder belt.

Thus, the plain language of FMVSS 209 precludes the use of the shoulder belt only system used by Volkswagen. Plaintiffs urge this Court to address the questions presented and rule the Volkswagen seat belt system in violation of Standard 209 S4.1(b).

CONCLUSION

For the above and forgoing reasons Plaintiffs request that their Petition for Writ of Certiorari be granted and that the important safety issues presented by this case be addressed by this Court.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8519

D.C. Docket No. 1:91-CV-1926-JEC

VICTORIA DOYLE, DUFFEY DOYLE,

Plaintiffs-Appellants,

versus

VOLKSWAGENWERK AKTIENGELELLSCHAFT, VOLKSWAGEN OF AMERICA, INC.,

Defendants-Appellees.

(Filed Jun. 12, 1997)

Appeal from the United States District Court for the Northern District of Georgia

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(June 12, 1997)

Before TJOFLAT and BARKETT, Circuit Judges, and CLARK, Senior Circuit Judge.

CLARK, Senior Circuit Judge:

This is a defective products case brought by plaintiffs-appellants Victoria and Duffey Doyle in the United States District Court for the Northern District of Georgia. Victoria Doyle alleged that she purchased a new 1989

Volkswagen Jetta, which was manufactured by defendant-appellee Volkswagen Aktiengesellschaft and imported into the United States by defendant-appellee Volkswagen of America, Inc. The Jetta was equipped with an automatic shoulder belt that required no action by the vehicle occupants. By design, the Jetta did not have a lap belt at the driver's or front seat passenger's position; instead, it used knee bolsters to prevent a person from sliding under the belt during a collision.

On August 18, 1989, while driving her new Jetta, Victoria Doyle was struck in the rear by another vehicle. As a result of the collision, Ms. Doyle sustained severe injuries to her right breast. Ms. Doyle's experts are prepared to testify that these injuries were caused by the shoulder belt and were exacerbated by the absence of a lap belt: without a lap belt to absorb a portion of the force of the impact, a majority of the force of the impact was focused on Ms. Doyle's right breast.

Plaintiffs' complaint set out three theories of liability: negligence, strict liability, and breach of the implied warranty of fitness. Plaintiffs filed a motion for partial summary judgment with the district court and provided the court with various literature outlining the alleged known dangers of the shoulder belt only system. Defendants also filed a motion for partial summary judgment. They alleged that the Jetta seat belt system complied with the Federal motor vehicle safety standards promulgated under the authority of the National Traffic and Motor

Vehicle Safety Act;[1] defendants argued that they were entitled to judgment as a matter of law because either (1) they had no duty under Georgia law to exceed these federal standards, or (2) plaintiffs' common law claims were preempted by the federal standards.

The district court granted defendants' motion for partial summary judgment and denied plaintiffs' motion. The court concluded that the Jetta seat belt system complied with the applicable federal standards, notwithstanding the absence of a lap belt. We concur in that conclusion. The district court further concluded that Georgia law as delineated in *Honda Motor Co. v. Kimbrel*[2] does not hold automobile manufacturers to a higher standard than federal requirements; thus, a plaintiff cannot recover under Georgia law for negligently creating a defective condition when the manufacturer is in compliance with federal standards. Because the Jetta seat belt system at issue was in compliance with federal standards, the court concluded that defendants could not be liable to plaintiffs as a result of the absence of a lap belt. Finding plaintiffs' claims precluded under Georgia law, the district court found it unnecessary to reach the preemption issue.

At a time after the district court's decision, this Circuit held that standards promulgated under the National Traffic and Motor Vehicle Safety Act do *not* preempt common law claims. *Myrick v. Freuhauf Corp.*, 13 F.3d 1516

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[1] Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified at 15 U.S.C. §§ 1381-1431).

[2] 189 Ga. App. 414, 376 S.E.2d 379 (Ga. App. 1988), *cert. denied* (Feb. 15, 1989).

(11th Cir.), *cert. granted*, ___ U.S. ___, 115 S.Ct. 306, 130 L.Ed.2d 218 (1994). The Supreme Court affirmed this Circuit's decision. *Freightliner Corp. v. Myrick*, ___ U.S. ___, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).

On April 24, 1996, we certified to the Georgia Supreme Court a question respecting whether Georgia law precludes personal injury product liability claims when an automobile manufacturer sells an automobile to a Georgia citizen and the automobile is in compliance with the National Traffic and Motor Vehicle Safety Act. The Georgia Supreme Court answered our certified question in the negative. Reference should be made to that court's holding, but we quote two separate statements:

> Georgia common law permits a Georgia citizen to sue an automobile manufacturer despite the manufacturer's compliance with the standards established by the National Automobile Safety Act.[3]

and

> The focus of the Safety Act is to reduce deaths and injuries from automotive accidents by promoting and enhancing safer automobile design. To that end, we determine that our state common law permits its citizens to pursue a personal injury product liability claim against an automobile manufacturer even if the automobile is in compliance with the Safety Act. This decision will not make the manufacturer an insurer of its product, for there is no duty to design an accident-proof vehicle. All we do today is affirm that proof of compliance with

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[3] 481 S.E.2d 518, 519 (Ga. 1997).

> federal standards or regulations will not bar manufacturer liability for design defect as a matter of law.[4]

In light of the Georgia Supreme Court's interpretation of the relationship between Georgia common law and the National Automobile Safety Act, we REVERSE the district court's decision in this case and REMAND to the district court for further proceedings.

REVERSED and REMANDED.

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[4] *Id.* at 521.

Victoria DOYLE, Duffey Doyle,
Plaintiffs-Appellants,

v.

VOLKSWAGENWERK AKTIENGELELLSCHAFT,
Volkswagen of America,
Inc., Defendants-Appellees.

No. 94-8519.

United States Court of Appeals,
Eleventh Circuit.

April 24, 1996.

Motorist who was injured in automobile accident brought action against manufacturer alleging that her injuries were caused by defective seat belt design, and both parties moved for partial summary judgment. The United States District Court for the Northern District of Georgia, No. 1:91-CV-1926-JEC, Julie E. Carnes, J., granted manufacturer's motion and denied motorist's on basis that Georgia law does not hold manufacturers to higher standard than do federal standards and system in use complied with federal standards, and entered judgment for manufacturer after parties submitted joint statement agreeing that ruling effectively precluded all claims. Motorist appealed, and the Court of Appeals, Clark, Senior Circuit Judge, held that question of whether Georgia law precludes personal injury product liability claim when automobile manufacturer sells automobile to Georgia citizen and automobile is in compliance with National Traffic and Motor Vehicle Safety Act would be certified to Georgia Supreme Court.

Question certified.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, Chief Judge, BARKETT, Circuit Judge, and CLARK, Senior Circuit Judge.

CLARK, Senior Circuit Judge:

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF GEORGIA PURSUANT TO O.C.G.A. § 15-2-9.

TO THE SUPREME COURT OF GEORGIA AND ITS HONORABLE JUSTICES:

It appears to the United States Court of Appeals for the Eleventh Circuit that this case involves an unanswered question of Georgia law that is determinative of this appeal. Therefore, we certify the following question of law, based on the facts recited below, to the Supreme Court of Georgia for instructions.

THE FACTS AND PRIOR PROCEEDINGS

This is a defective products case brought by plaintiffs-appellants Victoria and Duffey Doyle in the United States District Court for the Northern District of Georgia. Victoria Doyle alleged that she purchased a new 1989 Volkswagen Jetta, which was manufactured by defendant-appellee Volkswagen Aktiengelellschaft and imported into the United States by defendant-appellee Volkswagen of America, Inc. The Jetta was equipped with an automatic shoulder belt that required no action by the

vehicle occupants. By design, the Jetta did not have a lap belt at the driver's or front seat passenger's position; instead, it used knee bolsters to prevent a person from sliding under the belt during a collision.

On August 18, 1989, while driving her new Jetta, Victoria Doyle was struck in the rear by another vehicle. As a result of the collision, Ms. Doyle sustained severe injuries to her right breast. Ms. Doyle's experts are prepared to testify that these injuries were caused by the shoulder belt and were exacerbated by the absence of a lap belt: without a lap belt to absorb a portion of the force of the impact, a majority of the force of the impact was focused on Ms. Doyle's right breast.

Plaintiffs' complaint set out three theories of liability: negligence, strict liability, and breach of the implied warranty of fitness. Plaintiffs filed a motion for partial summary judgment with the district court and provided the court with various literature outlining the alleged known dangers of the shoulder belt only system. Defendants also filed a motion for partial summary judgment. They alleged that the Jetta seat belt system complied with the Federal motor vehicle safety standards promulgated under the authority of the National Traffic and Motor Vehicle Safety Act;[1] defendants argued that they were entitled to judgment as a matter of law because either (1) they had no duty under Georgia law to exceed these federal standards, or (2) plaintiffs' common law claims were preempted by the federal standards.

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[1] Pub.L. No. 89-563, 80 Stat. 718 (1966) (codified at 15 U.S.C. §§ 1381-1431).

The district court granted defendants' motion for partial summary judgment and denied plaintiffs' motion. The court concluded that the Jetta seat belt system complied with the applicable federal standards, notwithstanding the absence of a lap belt. We concur in that conclusion. The district court further concluded that Georgia law as delineated in *Honda Motor Co. v. Kimbrel*[2] does not hold automobile manufacturers to a higher standard than federal requirements; thus, a plaintiff cannot recover under Georgia law for negligently creating a defective condition when the manufacturer is in compliance with federal standards. Because the Jetta seat belt system at issue was in compliance with federal standards, the court concluded that defendants could not be liable to plaintiffs as a result of the absence of a lap belt. Finding plaintiffs' claims precluded under Georgia law, the district court found it unnecessary to reach the preemption issue.

At the end of its decision, the district court noted that defendants had not delineated on which counts they sought partial summary judgment. Thus, the court directed the parties "to file a joint statement within twenty days outlining the issues remaining to be determined." The parties filed a joint statement agreeing that the district court's ruling effectively precluded all of plaintiffs' claims. The district court then entered judgment for defendants, and plaintiffs appealed.

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[2] 189 Ga.App. 414, 376 S.E.2d 379 (1988), *cert. denied* (Feb. 15, 1989).

Since the district court's decision, this circuit has expressly held that standards promulgated under the National Traffic and Motor Vehicle Safety Act do *not* preempt common law claims. *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir.), *cert. granted*, ___ U.S. ___, 115 S.Ct. 306, 130 L.Ed.2d 218 (1994). The Supreme Court recently affirmed this circuit's decision. *Freightliner Corp. v. Myrick*, ___ U.S. ___, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).

DISCUSSION

Although we agree defendants are correct that the Jetta seat belt system complies with applicable federal standards, we must determine whether the district court correctly interpreted Georgia law. In concluding that Georgia law precludes automobile product liability claims when the manufacturer has complied with applicable federal standards, the district court relied on *Honda Motor Co. v. Kimbrel*. In *Kimbrel*, the plaintiff was injured in a collision that occurred while she was driving a Honda Accord. The plaintiff alleged that Honda Motor Company had created a defective condition by failing to equip the car with airbags, which were not required under the applicable federal regulations. The court began by saying:

> The parties have argued exhaustively regarding preemption by federal law, but we must first determine if there is *any* right to recover under Georgia law, because preemption results where state law conflicts with or is more stringent than federal law and regulations.[3]

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[3] 376 S.E.2d at 382 (footnote omitted).

The court then went on to conclude that the plaintiff was without any right to recover under Georgia law because Honda Motor Company had complied with applicable federal standards:

> Because the Georgia standard of duty does not exceed the federal, Georgia would mandate only that federal standards be met. See Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (1981). When the case law and statutory pattern are combined the result is that recovery for negligent product design could not be had against the manufacturer of a vehicle in compliance with federal regulations as to safety restraints. In these circumstances there would be no basis for requiring a manufacturer to furnish passive restraints or airbags in lieu of safety belts and a jury would not be authorized to find any breach of duty in the failure to supply them to a consumer.[4]

Thus, on the facts before it, the Georgia Court of Appeals held that Georgia law precludes automobile product liability claims when the manufacturer has complied with applicable federal standards.

We agree that the Georgia Court of Appeals correctly decided *Kimbrel*. In that case it was shown the manufacturer had complied with the National Safety Standards Act by installing the required seat belts. Plaintiff's only complaint was that the manufacturer should have installed air bags. Our court in *Taylor v. General Motors Corp.*[5] had the identical factual setting in a diversity case

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[4] *Id.* at 383.

[5] 875 F.2d 816 (11th Cir.1989).

arising in Florida. In *Taylor* we first discussed two key provisions in the Safety Act:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.[6]
>
> * * *
>
> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.[7]

Our court made reference to the fact that the Safety Act "grants automobile manufacturers the option of complying with federal standards for occupant crash protection by installing manual seat belts instead of airbags." After discussing the cases governing express and implied preemption, the panel in *Taylor* concluded:

> *de la Cuesta* [458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)] governs this case. It holds that a state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option. *See id.* In accordance with *de la Cuesta*, we conclude that a state common law

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[6] 15 U.S.C. § 1392(d) (1982).

[7] *Id.* § 1397(c).

> rule that would, in effect, *remove the element of choice* authorized in Safety Standard 208 would frustrate the federal regulatory scheme. We therefore hold that appellants' theory of recovery is impliedly preempted by Safety Standard 208 and the Safety Act.[8]

While *Taylor* endorses the Georgia Court's ruling in *Kimbrel,* it makes clear that preemption exists only when there is a *conflict* between federal and state law, as there would have been had *Kimbrel* been decided otherwise. In the present case, plaintiff alleged two common law actions: Count Two in negligence and Count Three in breach of implied warranty of fitness. We view the district court as not allowing plaintiff to seek relief in her common law actions. That court did rely upon this statement in *Kimbrel:* "Because the Georgia standard of duty does not exceed the federal, Georgia would mandate only the federal standards be met."[9]

The purpose of this certification to the Georgia Supreme Court is to determine whether the quoted statement is correct. The United States Supreme Court has said: "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."[10] Thus, this

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[8] 875 F.2d at 827 (emphasis added) (footnote omitted).

[9] 376 S.E.2d at 383.

[10] *West v. American Telephone & Telegraph Co.,* 311 U.S. 223, 237, 61 S.Ct. 179, 183, 85 L.E. 139 (1940).

court must follow *Kimbrel* unless there is "persuasive data" that the Supreme Court of Georgia might render a decision contrary to *Kimbrel*.

We find in *Banks v. ICI Americas, Inc.*, "persuasive data" that the Supreme Court of Georgia *might* render a decision contrary to *Kimbrel*.[11] In *Banks*, the parents of a child who died after ingesting a pesticide brought suit alleging that the pesticide was defectively designed. The Supreme Court of Georgia used the *Banks* opinion to articulate a new "risk-utility analysis" to be applied in design defect cases: "[W]e conclude that the better approach is to evaluate design defectiveness under a test balancing the risks inherent in a product design against the utility of the product so designed."[12] The court then set out in a footnote a "non-exhaustive list of general factors" to be considered in applying this new analysis; at the end of the list is this statement:

> We note that a manufacturer's proof of compliance with industry-wide practices, state of the art, or federal regulations does not eliminate conclusively its liability for its design of allegedly defective products.[13]

We find in this language "persuasive data" that the Supreme Court of Georgia may not conclude that Georgia law precludes product liability claims when the manufacturer has complied with federal standards.

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[11] 264 Ga. 732, 450 S.E.2d 671 (1994).

[12] *Id.* at 674.

[13] *Id.* at 675 n. 6.

Accordingly, we certify the following question to the Supreme Court of Georgia:

> WHEN AN AUTOMOBILE MANUFACTURER SELLS AN AUTOMOBILE TO A GEORGIA CITIZEN AND THE AUTOMOBILE IS IN COMPLIANCE WITH THE NATIONAL AUTOMOBILE SAFETY ACT, DOES GEORGIA LAW PRECLUDE A PERSONAL INJURY PRODUCT LIABILITY CLAIM?

The entire record in this case and the briefs of the parties shall be transmitted to the Supreme Court of Georgia for assistance in answering this question.

QUESTION CERTIFIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VICTORIA DOYLE and DUFFEY DOYLE, Plaintiffs, vs. VOLKSWAGENWERT AKTIENGELELLSCHAFT and VOLKSWAGEN OF AMERICA, Defendants.	CIVIL NO. 1:91-CV-1926-JEC (Filed Mar. 7, 1994)

ORDER

This case is presently before the Court on plaintiffs' motion for partial summary judgment [#28], defendants' motion for partial summary judgment [#45], defendants' motion for protective order, and plaintiffs' motion to supplement the record on summary judgment [#58]. The Court has reviewed the record and the arguments of the parties and, for the reasons set forth below, denies plaintiffs' motion for partial summary judgment [#28], grants defendants' motion for partial summary judgment, denies defendants' motion for protective order, and denies plaintiffs' motion to supplement the record on summary judgment.

Background

Plaintiff Victoria Doyle alleges she bought a new 1989 Volkswagen Jetta, Vehicle Identification Number WVWRB1161KW445429 ("the Jetta"), which defendant Volkswagen Aktiengelellschaft ("Volkswagen AG") manufactured and defendant Volkswagen of America imported into the United States and marketed. Plaintiffs allege that on August 18, 1989, while driving the Jetta, Victoria Doyle was involved in an automobile collision in which her shoulder belt caused injury to her right breast. The Jetta did not have a lap belt; instead, it used knee bolsters to prevent a person from sliding under the belt during a collision. Plaintiffs allege that defendants' failure to include a lap belt in the Jetta caused plaintiff Victoria Doyle's injury. Plaintiff Victoria Doyle states three counts in her complaint: Strict liability, negligence, and breach of implied warranty of fitness. Plaintiff Duffey Doyle asserts a claim for loss of consortium.

Plaintiffs and defendants have moved for partial summary judgment. Defendants have also moved for a protective order, and plaintiffs have moved to supplement the record on summary judgment.

Discussion

Plaintiffs argue in their motion for partial summary judgment that the 1989 Volkswagen Jetta owned by plaintiff violated the Federal Motor Vehicle Safety Standards ("FMVSS") because it violated 49 C.F.R. § 571.208 and 49 C.F.R. § 571.209 ("Standards 208 and 209") by not including a lap seat belt and by failing to provide the warning set forth in Standard 209. Defendants contend that the

Jetta seat belt complied with the FMVSS and that they are entitled to partial summary judgment for two reasons: (1) defendants had no duty under Georgia law to exceed the federal standards, and (2) plaintiffs' common law claims are preempted by the FMVSS.

A. *Standard for Summary Judgment*

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A fact's materiality is determined by the controlling substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.* at 249-50.

Summary judgment is not properly viewed as a device that the trial court may, in its discretion, implement in lieu of a trial on the merits. Instead, Rule 56 of the Federal Rules of Civil Procedure *mandates* the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of *every* element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In such a situation, there can be no genuine issue as to any material fact, as a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.* at 322-23.

The movant bears the initial responsibility of asserting the basis for his motion. *Id.* at 323. However, the movant is not required to negate his opponent's claim. The movant may discharge his burden by merely " 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. After the movant has carried his burden, the non-moving party is then required to "go beyond the pleading" and present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Id.* at 324. While the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, *Samples v. City of Atlanta,* 846 F.2d 1328, 1330 (11th Cir. 1988), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson,* 477 U.S. at 247-48 (1986).

B. *Compliance with FMVSS*

Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966 ("the Safety Act") "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381 (1982). Congress sought to increase automotive safety by authorizing the promulgation of safety standards. *See* 15 U.S.C. §§ 1391(2), 1392(a) (1982). The responsibility for promulgating these standards was given first to the Department of Transportation and later to the National Highway Transportation Safety Administration. *Taylor v. General Motors Corp.,* 875 F.2d 816 (11th Cir. 1989), *cert. denied,* 494

U.S. 1065 (1990). The standards at issue in this case are Standard 208 entitled "Occupant crash protection" and Standard 209 entitled "Seat belt assemblies."

Under Standard 208, defendants had three options with which to satisfy the safety standards as to occupant crash protection. *See* 49 C.F.R. § 571.208, S4.1.3.2, S4.1.3.3. The first option was a frontal/angular automatic protection system, S4.1.2.1; the second option was a head-on automatic protection system, S4.1.2.2; and the third option was a lap and shoulder belt protection system with a belt warning, S4.1.2.3. Defendants assert that the Jetta complied with the second option. The second option under Standard 208, S-.4.1.1.2, provides:

> (a) At each designated seating position have a Type 1 seat belt assembly or a Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;
>
> (b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;
>
> (c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and
>
> (d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

49 C.F.R. § 571.208, S4.1.1.2.

Standard 209 defines seat belt assemblies. A Type 1 seat belt assembly is "a lap belt for pelvic restraint," and a Type 2 seat belt assembly is "a combination of pelvic and upper torso restraints". 49 C.F.R. § 571.209, S3. Plaintiffs maintain that the Jetta did not comply with option 2 because it did not include a lap belt. Plaintiffs also cite Standard 209, S4.1(b) which states in pertinent part: "A seat belt assembly shall provide pelvic restraint whether or not upper torso restraint is provided . . . " 49 § 571.209, S4.1(b).

Defendants, however, point to Standard 208, S4.5.3., which provides:

> *Automatic belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4, and in place of any seat belt assembly otherwise required by that option.

49 C.F.R. § 571.208, S4.5.3. Additionally, S.4.5.3.1 provides that an automatic belt that provides only pelvic restraint may not be used to comply with S4.5.3.

Defendants contend that the Jetta complied with the regulation because the shoulder belt in the Jetta was an automatic belt that required no action by the vehicle occupants. Defendants used the automatic belt to meet the crash protection requirements of S4. Moreover, defendants assert that they used the automatic belt in compliance with S4.5.3 "in place of any seat belt assembly otherwise required by that option."

Defendants submit five interpretations of S4.5.3 by the National Highway Traffic Safety Administration ("NHTSA") to support their position. (Exs. E-I, Defs.' Resp. to Pls.' Mot. for Partial Summ. J.). In a letter from the Chief Counsel of the NHTSA to attorney Rembert Ryans, for example, the Chief Counsel addressed Ryans' inquiry "whether manufacturers were required to install a lap belt at seating positions equipped with automatic belts certified as complying with occupant protection requirements in Standard 208." (Ex. E, Defs.' Resp. to Pls.' Mot. for Partial Summ. J.). The Chief Counsel answered that manufacturers were not required to install a lap belt in that situation. He explained that S4.5.3 of Standard 208 affords relief from Standard 209 if the passive belt is capable of meeting S5.1 in a frontal perpendicular impact.[1] Thus, according to the NHTSA's interpretation, an automatic seat belt substituted under S4.5.3 need not be equivalent to a Type 1 or Type 2 seat belt as defined in Standard 209. Defendants also cite *O'Bryan v. Volkswagen of Am., Inc.*, 89-0059 (W.D.Ky. Aug. 4, 1992), in which the court noted that the NHTSA has required that the automatic belt only meet the frontal crash protection requirements of S5.1 in a perpendicular impact.

Defendants assert that the Court should accept the NHTSA's interpretation of the regulations. Plaintiffs

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[1] Defendants submit an affidavit from Uwe Meissner, a Product Analysis Manager for Volkswagen of America, in which he states that the passive restraint system in the 1989 Volkswagen Jetta was certified to be in compliance with the frontal or perpendicular barrier crash test requirements of FMVSS No. 208. (Ex. A, Defs.' Resp. to Pls.' Mot. for Partial Summ. J.).

argue, however, that the Court should disregard the NHTSA's interpretation and find that the Jetta did not comply with the regulations. "It is well established 'that an agency's construction of its own regulations is entitled to substantial deference.' " *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150 (1991) (quoting *Lyng v. Payne*, 476 U.S. 926, 939 (1986)). If the agency's interpretation conforms with the purpose and wording of the regulations, where "the meaning of [regulatory] language is not free from doubt," a court should defer to the agency's interpretation if the interpretation is reasonable. *Id.* (quoting *Ehlert v. United States*, 402 U.S. 99, 105 (1971)).

Passive restraint systems protect the passenger of an automobile without the passenger taking any action such as fastening a seat belt. Option Two of Standard 208 was created so that car manufacturers could introduce passive restraint systems that did not meet the requirements of option one. 39 Fed. Reg. 3834 (1974). The Court concludes that the agency's interpretation is reasonable given the policy behind the regulation. The agency encouraged the introduction of passive restraint systems, and it thus gave the manufacturers an incentive to introduce automatic belts. *O'Bryan v. Volkswagen of Am., Inc.*, 89-0059 (W.D.Ky. Aug. 4, 1992). Further, the court holds that the language of the regulation does not preclude the agency's interpretation. Standard 208, S4.5.3. provides that an automatic belt may be used in place of seat belt assemblies, and Volkswagen used the automatic belt for that purpose.

Accordingly, the Court holds that defendants met the federal standards for passenger restraints.[2]

Plaintiffs further argue that defendants should have included the warning in Standard 209 S4.1(1) in the Jetta. Standard 209 S.4.1(1) provides in part: "Instructions for Type 2a shoulder belt shall include a warning that the shoulder belt is not to be used without a lap belt." 49 C.F.R. § 571.209, S4.(1). The Jetta, however, did not include a Type 2a shoulder belt because defendants substituted the seat belt assembly with an automatic belt.[3] Moreover, as discussed *supra*, automatic belts that are

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[2] Plaintiffs submitted an affidavit of Billy Peterson in support of their motion for partial summary judgment. Mr. Peterson worked as a mechanical engineer for the NHTSA. He asserts in the affidavit that in his opinion, the system in the Jetta did not meet the requirements of 49 C.F.R. § 571.208, S4.1.2.1(c)(2), 49 C.F.R. § 571.208 S.4.5.3 or 49 C.F.R. § 571.209. Defendants contend that the Court should disregard Peterson's affidavit because he is not qualified to interpret the regulatory provisions at issue in this case and because the interpretation of law is not the proper subject of expert testimony.

The Court Concludes that Peterson's opinion is irrelevant. Although Peterson's opinion is that the belt did not comply with the federal standards, the persons at NHTSA charged with interpreting the regulations interpreted Standard 208, S4.5.3 as providing that an automatic seat belt does not need to include a lap belt. The Court has further held that NHTSA's interpretation was reasonable. Because Peterson's opinion is not material, his affidavit does not preclude summary judgment. *Anderson*, 477 U.S. at 247-48 (1986).

[3] A type 2a shoulder belt is defined as: "an upper torso restraint for use only in conjunction with a lap belt as a Type 2 seat belt assembly." Standard 209, S3.

installed to meet the frontal crash protection requirements are excepted from the other requirements of standard 209 by S4.5.3.4 of standard 208. Thus, defendants' were not required to have the warning in Standard 209 and defendants' motion for summary judgment is granted on the Standard 209 warning.

C. *Plaintiffs' Common Law Claims*

Defendants contend that because they have complied with the federal standard, plaintiff Virginia Doyle cannot prevail on her common law claims. Defendants first assert that Georgia law does not hold automobile manufacturers to a higher standard than federal requirements. Defendants additionally maintain that plaintiff's common law claims are preempted by federal law.

Defendants contend that the Georgia Court of Appeals case *Honda Motor Co. v. Kimbrel,* 189 Ga. App. 414 (1988), bars plaintiff's claims relating to the seat belt. In *Kimbrel,* the plaintiffs alleged that Honda's automobile was defective because it was not equipped with airbags or other passive restraints. In holding that plaintiff's claim for negligently creating a defective condition must fail, the court noted that the public policy expressed by the Georgia legislature "evinces a considered posture of laissez-faire regarding occupant protection and restraints." *Id.* at 417. The court held that the Georgia standard of duty does not exceed the federal standard and that therefore Georgia mandates only that federal standards be met. *Id.* at 419. Hence, a plaintiff cannot recover under Georgia law for negligent product design as to safety restraints when the manufacturer was in

compliance with federal regulations. The court further held that plaintiff could not bring a claim for strict liability under O.C.G.A. § 51-1-11 because the "[s]afety belts rather than airbags would not be a defect within the meaning of the code section." *Id.*

Two courts in the Northern District of Georgia, in unpublished opinions, have followed the holding in *Kimbrel.* in *Rainey v. Fuji Heavy Indus., Ltd.*, 91-CV-101-CAM (N.D.Ga. Jan. 15, 1993) (Moye, J.), the court held that plaintiff's claim that a 1982 Subaru should have had shoulder belts for the back seat passengers was precluded under theories of negligence and strict liability under Georgia law because the manufacturer had complied with federal standards. Likewise, in *Mathison v. General Motors Corp.*, 87-CV-2572-MHS (N.D.Ga. Oct. 10, 1991) (Shoob, J.), the court held that Georgia law barred plaintiff's claim that the rear seats of a 1985 GMC Jimmy should have included shoulder belts. The court found that the defendant satisfied its obligation under Georgia law by complying with the applicable federal standards. Accordingly, the Court holds that under Georgia law as set forth in *Kimbrel*, defendants have complied with FMVSS 208 and 209 and are not liable to Plaintiffs as a result of the absence of a lap belt in the automatic restraint system.[4]

Defendants do not delineate on which counts they are seeking partial summary judgment. As noted previously, plaintiffs' complaint includes three theories of liability: (1) negligence, (2) strict liability, and (3) breach of

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[4] Because plaintiffs' claims are precluded under Georgia law, the Court need not address defendants' preemption arguments.

implied warranty of fitness. The Court grants partial summary judgment for defendants as to liability asserted as a result of the absence of a lap belt. The parties have not indicated how such a ruling affects the three theories of liability or what issues are now left to be litigated. Accordingly, the Court DIRECTS the parties to file a joint statement within twenty days outlining the issues remaining to be determined.

Conclusion

For the foregoing reasons, the Court grants defendants' motion for partial summary judgment [#45] and denies plaintiffs' motion for partial summary judgment [#28]. The Court denies plaintiffs' motion to supplement their motion for summary judgment, which was filed several months after the close of briefing on the motion. Because the Court understands that the parties have resolved the issues in defendant's motion for protective order [#36], the Court denies the motion as moot.

SO ORDERED, this 7th day of March, 1993.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8519

VICTORIA DOYLE, DUFFEY DOYLE,

Plaintiffs-Appellants,

versus

VOLKSWAGENWERK AKTIENGELELLSCHAFT,
VOLKSWAGEN OF AMERICA, INC.,

Defendants-Appellees.

(Filed Sep. 16, 1997)

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: TJOFLAT and BARKETT, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

* * *

49 C.F.R. § 571.208

S4.5.3 *Automatic belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option.

S4.5.3.1 An automatic belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly. An automatic belt may not be used pursuant to S4.5.3 to meet the requirements of S4.1.5.1(a)(3) for a Type 2 seat belt assembly at any seating position equipped with an inflatable restraint system pursuant to S4.1.5.2, S4.1.5.3, S4.2.6.1, or S4.2.6.2 of this standard.

S4.5.3.2 An Automatic belt, furnished pursuant to S4.5.3, that provides both pelvic and upper torso restraint may have either a detachable or nondetachable upper torso portion, notwithstanding provisions of the option under which it is furnished.

S4.5.3.3 An automatic belt furnished pursuant to S4.5.3 shall:

(a) Conform to S7.1 and have a single emergency release mechanism whose components are readily accessible to a seated occupant.

(b) In place of a warning system that conforms to S7.3 of this standard, be equipped with the following warning system: At the left front designated seating position (driver's position), a warning system that activates a

continuous or intermittent audible signal for a period of not less than 4 seconds and not more than 8 seconds and that activates a continuous or flashing warning light visible to the driver for not less than 60 seconds (beginning when the vehicle ignition switch is moved to the "on" or the "start" position) when condition (A) exists simultaneously with condition (B), and that activates a continuous or flashing warning light, visible to the driver, displaying the identifying symbol for the seat belt telltale shown in Table 2 of Standard No. 101 (49 CFR 571.101), or, at the option of the manufacturer if permitted by Standard No. 101, displaying the words "Fasten Seat Belts" or "Fasten Belts," for as long as condition (A) exists simultaneously with condition (C).

(A) The vehicle's ignition switch is moved to the "on" position or the "start" position.

(B) The driver's automatic belt is not in use, as determined by the belt latch mechanism not being fastened, or, if the automatic belt is non-detachable, by the emergency release mechanism being in the released position. In the case of motorized automatic belts, the determination of use shall be made once the belt webbing is in its locked protective mode at the anchorage point.

(C) The belt webbing of a motorized automatic belt system is not in its locked, protective mode at the anchorage point.

S4.5.3.4 An automatic belt furnished pursuant to S4.5.3 that is not required to meet the perpendicular frontal crash protection requirements of S5.1 shall

conform to the webbing, attachment hardware, and assembly performance requirements of Standard No. 209.

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49 C.F.R. § 571.209

S3. *Definitions. Adjustments hardware* means any or all hardware designed for adjusting the size of a seat belt assembly to fit the user, including such hardware that may be integral with a buckle, attachment hardware, or retractor.

Attachment hardware means any or all hardware hardware designed for securing the webbing of a seat belt assembly to a motor vehicle.

Automatic-locking retractor means a retractor incorporating adjustment hardware by means of a positive selflocking mechanism which is capable when locked of withstanding restraint forces.

Buckle means a quick release connector which fastens a person in a seat belt assembly.

Emergency-locking retractor means a retractor incorporating adjustment hardware by means of a locking mechanism that is activated by vehicle acceleration, webbing movement relative to the vehicle, or other automatic action during an emergency and is capable when locked of withstanding restraint forces.

Hardware means any metal or rigid plastic part of a seat belt assembly.

Load-limiter means a seat belt assembly component or feature that controls tension on the seat belt to modulate the forces that are imparted to occupants restrained by the belt assembly during a crash.

Nonlocking retractor means a retractor from which the webbing is extended to essentially its full length by a small external force, which provides no adjustment for assembly length, and which may or may not be capable of sustaining restraint forces at maximum webbing extension.

Pelvic restraint means a seat belt assembly or portion thereof intended to restrain movement of the pelvis.

Retractor means a device for storing part or all of the webbing in a seat belt assembly.

Seat back retainer means the portion of some seat belt assemblies designed to restrict forward movement of a seat back.

Seat belt assembly means any strap, webbing, or similar device designed to secure a person in a motor vehicle in order to mitigate the results of any accident, including all necessary buckles and other fasteners, and all hardware designed for installing such seat belt assembly in a motor vehicle.

Strap means a narrow nonwoven material used in a seat belt assembly in place of webbing.

Type I seat belt assembly is a lap belt for pelvic restraint.

Type 2 seat belt assembly is a combination of pelvic and upper torso restraints.

Type 2a shoulder belt is an upper torso restraint for use only in conjunction with a lap belt as a Type 2 seat belt assembly.

Upper torso restraint means a portion of a seat belt assembly intended to restrain movement of the chest and shoulder regions.

Webbing means a narrow fabric woven with continuous filling yarns and finished salvages.

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49 C.F.R. § 571.209

S4.1 (b) *Pelvic restraint.* A seat belt assembly shall provide pelvic restraint whether or not upper torso restraint is provided, and the pelvic restraint shall be designed to remain on the pelvis under all conditions, including collision or roll-over of the motor vehicle. Pelvic restraint of a Type 2 seat belt assembly that can be used without upper torso restraint shall comply with requirement for Type 1 seat belt assembly in S4.1 to S4.4.